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Motions to Dismiss under FRCP 12(b)(6)

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The following is excerpted with permission from Chapter 6 of the first edition of West's Business and Commercial Litigation in the Federal Courts, *"Responses to Complaints," of which chapter I was the author along with Clyde A. Szuch, then head of Pitney, Hardin, Kipp & Szuch. Lawyer and legal writer and editor Jane Coleman was the subsequent co-author of updates until the second edition of the treatise. Footnote references are omitted — for that, you'll want the up-to-date version of the book. Don't rely on this as legal advice; it's not. I have also recently (August, 2008) updated it in light of the Supreme Court's decision in* Bell Atlantic v. Twombly, *as set out in violet below.*

§ 6.5 Motions to Dismiss Generally

(a) Motions to Dismiss: Strategy

Why is discussion of motions to dismiss placed before the section on answering the complaint? The reason is that every complaint must at one point be evaluated to determine whether or not dismissal would be appropriate, even though many such motions fail. If a strong motion to dismiss can be made, it should be seriously considered. This is especially true where the motion is to be based on a fundamental insufficiency in the complaint, such that little factual investigation is required by the defense, and where answering the complaint and preparing affirmative defenses, counterclaims, cross claims or third party complaints would be a substantial undertaking.

There is also a conceptual reason: the idea of a motion to dismiss is that the complaint — or more specifically, the claim — is so lacking in merit that no answer is necessary. Certainly if that is the case, and it seems likely that the judge can be made to agree that dismissal is appropriate, there is no reason to start drafting an answer.

(b) Practical Considerations

Successful motions to dismiss a complaint are a rarity, more the subject of law school civil procedure classes than actual practice. There are several reasons for this. One is the modern doctrine mandating liberal pleadings standards. In effect this means that courts will look not so much at the artfulness in the drafting of the complaint as much as the substance of the purported claim. There is also a corollary to this doctrine: The courts have a general policy of determining actions on the merits.

The effect of these approaches must be fully appreciated when considering the seeming promise of motions to dismiss, especially motions for failure to state a claim under FRCP 12(b)(6). Too often a brilliant motion to dismiss the complaint that ruthlessly exposes holes and inconsistencies in the pleadings results only in the plaintiff's filing, at the court's invitation, an amended complaint now free of all the deficiencies pointed out in the motion. All that is accomplished substantively is that the plaintiff has been forced to focus on its case and, with the assistance of the court's decision on the dismissal motion, recast areas in which its complaint was weak. In the process the defendant has helped the plaintiff eliminate sinkholes and traps in the complaint that may have been useful to the defense on a later summary judgment motion or at trial. Furthermore, judges sometimes become de facto "advocates" of claims "revived" in their opinions denying motions to dismiss.

For these reasons a motion to dismiss a fundamentally meritorious claim based on technical deficiencies may not be worth the price of the motion and of the defense's credibility with the judge. Faced with obvious weaknesses in the plaintiff's case, it may be worth considering whether a stronger motion may be brought as a summary judgment application following a limited amount of discovery. In this instance keep in mind that many judges will not permit summary judgment motions prior to the close of discovery because of their wariness of "dueling affidavits" as a basis for making substantive rulings.

None of this is to say that there is no place for Rule 12(b) motions. There are times when the defendant simply should not have to appear in federal court, or at least not in the venue where suit has been brought. Perhaps there is an arbitration clause, bargained for at some cost, on which the defendant is entitled to rely. Some complaints are just too lacking in merit to be worthy of the defendant's time and money. And though the phrase has become a cliché, in the right circumstance there is something to be said for "educating the judge" about a case by bringing a Rule 12 motion early on, even if, while meritorious, the motion may not be enough to end the proceedings.

§ 6.6 FRCP 12(b) Motions to Dismiss

(a) Time to Move

Just as with any other response to a complaint, a motion to dismiss under FRCP 12(b) must be made within 20 days of receipt of the summons and complaint. Making the motion stops the clock on the answer itself, pursuant to FRCP 12(a)(4). This applies to the whole of the pleadings, regardless of what part of the complaint is the subject of the motion to dismiss. Therefore, it has been held that a motion to dismiss one

count of a 10-count complaint stays the time to answer the entire complaint. Note, however, that this fa should not give rise to "creative" approaches to obtaining more time to answer the complaint. Courts have defaulted parties for filing frivolous FRCP 12 motions solely to extend time. If the motion is denied or postponed, the answer is due within 10 days of receiving notice of the court's action.

As usual, an eye must be kept on discovery. Here local rules may govern whether discovery is stayed; or the judge may have a policy that is embodied in a standing order or that is simply stated to the parties when the motion is filed. The parties also may seek from the court either a stay of discovery or permission to proceed.

(b) Strategy: Defenses vs. Motions to Dismiss

FRCP 12(b) requires all defenses to be asserted in the answer, but directs that the following seven of them may be resolved by motion or merely left as defenses:

1. Lack of subject matter jurisdiction

2. Lack of personal jurisdiction

3. Improper venue

4. Insufficiency of process

5. Insufficiency of service of process

6. Failure to state a claim on which relief can be granted

7. Failure to join a party under Rule 19.

These seven are the Rule 12 bases for motions to dismiss. The question arises whether they should be invoked in such a motion, asserted as a defense, or both.

These grounds for dismissal should always be asserted as defenses if available in good faith, regardless of whether motion practice is intended when the answer is filed or even if motions have been brought and have failed on these bases. Ultimately, however, FRCP 12(d) requires that the merits of FRCP 12 defenses must be decided at some point before trial, unless the court decides otherwise. The exception to this is where the court lacks subject matter jurisdiction, discussed in the next section.

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(c) Subject Matter Jurisdiction, FRCP 12(b)(1)

As discussed in Chapter 1 "Subject Matter Jurisdiction" supra, federal courts are courts of limited jurisdiction. The complaint must state that the requirements of subject matter jurisdiction are met in the matter. More importantly, they must actually be met. If a court lacks subject matter jurisdiction, it simply has

no authority to decide the case — even if the parties are willing to waive objection or stipulate to the fact court's jurisdiction.

For this reason, a challenge to the court's subject matter jurisdiction may be brought at any time, even after final judgment is entered and regardless of the prejudice that would result by dismissing the action after proceedings have been under way. On a motion challenging jurisdiction, the court tests the existence of subject matter jurisdiction as of the date the lawsuit was filed, not later. It is not a useful strategy, therefore, to attempt to deprive the court of jurisdiction in a diversity case after the suit is filed by having the defendant move its domicile to the same state as the plaintiff.

As the party invoking the federal court's jurisdiction, the plaintiff must show that it has the right to do so. Therefore, once the defendant attacks the basis of the court's subject matter jurisdiction, it has shifted the burden of coming forward to the plaintiff.

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§ 6.7 Motions to Dismiss Under FRCP 12(b)(6)

(a) Introduction

The successful FRCP 12(b)(6) application is the home run of motions. It is a challenge made at the very beginning of a case and strikes at the very heart of the lawsuit. It is a statement that even if the plaintiff were given every benefit of the doubt and everything it claimed were true, the plaintiff's claim should be dismissed — either because it is not legally cognizable or because sufficient facts have not been alleged to make out a cognizable claim.

When considering a 12(b)(6) motion, the court presumes that all the allegations of the complaint are true; it resolves all doubts or inferences in the plaintiff's favor; and it reads the complaint in the light most favorable to the plaintiff. Needless to say, the burden of proof on such a motion is on the party making it. No material from outside the pleadings may be considered or the motion will be considered one for summary judgment (see Section 6.7(d), infra).

Given all these benefits and the liberal pleading requirements of the Rules, all the plaintiff has to do to survive the motion is make out some sort of claim for which a court might provide relief. For every home run, therefore, there are innumerably more strikeouts or at best routine hits (i.e., when partial dismissal is granted as to some claims). The purpose of this section is to assist in picking the right pitches, and to consider when a "long out" (see Section 6.7(c)(3), "Educating the Judge," infra) can have the desired effect, even though the ball stays in the park.

(b) Issues to Raise with Clients

There is little that is more satisfying in commercial litigation defense than winning a dramatic 12(b)(6) motion on behalf of a defendant eager to end a potentially expensive and vexatious court case. Conversely,

the attorney should visualize the expression on the client representative's face as he realizes the implica of an unsuccessful 12(b)(6) motion in a commercial case — unless he has been adequately counseled about the potential costs, risks and rewards involved in the undertaking.

Because the plaintiff is given every benefit of the doubt in both law and fact, the 12(b)(6) motion theoretically requires the movant to ~~"play out" every factual scenario~~ demonstrate that the pleading alleges enough facts to state a claim to relief that is "plausible" within the four corners of the complaint. Similarly, every plausible legal theory that might provide relief to the plaintiff, based on the facts pleaded, must be considered.

For this reason the 12(b)(6) motion can, in some instances, be more costly and difficult than a summary judgment motion, though the motion to dismiss does not usually involve extensive affidavits as does a summary judgment application. In the latter proceeding, however, it is easier to limit the factual scenario that must be considered by submission of competent evidence that circumscribes the possibilities sketched out by the pleadings. That is harder to do under 12(b)(6), though much depends on the judge's inclinations.

Indeed, as a final caveat to the 12(b)(6) approach, practitioners should advise their clients that granting the motion takes a certain level of judicial confidence that not every court can muster. The number of cases overturning 12(b)(6) dismissals surely dwarfs those that affirm such rulings, and it is the path of least resistance simply to decree that it would be more appropriate to decide the issues after "some discovery" has been taken. This seems to the judge like not deciding the motion, and in a sense it is; yet it is a denial of the motion, for the effects of which the defendant must be prepared.

Still and all there is a place for the judicious use of a 12(b)(6) motion. That place is not only the obvious case where the complaint puts forth a cause of action that is plainly not justifiable (e.g., seeking damages for invasion of privacy arising from the defendant's alleged use of microwave beams to read the plaintiff's mind5). The scenarios in which a 12(b)(6) motion is appropriate will be discussed below in Section 6.7(c). The critical point is to lay out the risks, rewards and benefits clearly for the client to allow a maximally informed choice about whether to proceed.

(c) Reasons to Bring a 12(b)(6) Motion

Despite the long odds, there are several reasons why a defendant might bring a 12(b)(6) motion, only one of which is that it might succeed in full:

(1) Elimination of Plainly Nonjusticiable Cases

It should go without saying that a 12(b)(6) motion is the appropriate vehicle for certain lawsuits that, on simple inspection, do not make out claims for legal relief. There is some point where even the minimal pleading requirements are not met, where even given every benefit of the doubt, the facts alleged cannot in any way be scrambled to create a cause of action. Identifying the line between the obvious and the less obvious candidates for inclusion in this category requires a certain amount of experience, but it can fairly be

said that some complaints fall into the category of "I [the judge] know it when I see it."

This must be contrasted, however, with the situation where the plaintiff has pleaded facts that in themselves may add up to a valid legal claim but has set forth inappropriate legal theories as the basis for recovery. Dismissal will not be granted when this is the case, though if the complaint is truly incomprehensible, the defendant may be entitled to relief under FRCP 12(e), a motion for a more definite statement (see Section 6.8(c), infra).

(2) Cutting off Novel Legal Theories

Faced with a complaint, some commercial clients may have an interest, eminently reasonable, in "snuffing out" novel legal theories put forth or even suggested by the complaint. Such theories of recovery may pose a larger threat to some defendants' interests than the immediate pending litigation. In such cases clients might put a very high premium on delivering a crashing blow to the plaintiff and discouraging similar litigation by those similarly situated.

These are the situations, however, where fully apprising the client of the range of possibilities under 12(b)(6) is essential. The unsuccessful 12(b)(6) motion in this situation may be far worse than no motion at all and will, in all likelihood, have precisely the opposite effect from the one intended because the judge may help the plaintiff articulate the theory better. Since most 12(b)(6) motions are unsuccessful, taking this approach is one of the more daring maneuvers in commercial litigation.

The risk of this preemptive strike strategy, great as it is inherently, is heightened by a line of authority stating that it is precisely where novel legal theories are proffered that dismissal is inappropriate, on the theory that development in discovery — the bugaboo of motions to dismiss — can help the court assess the propriety of the claim.

(3) "Educating the Judge"

There may be some situations, as discussed in Section 6.5(b), supra, where a 12(b)(6) motion is an appropriate vehicle to put the defendant's prima facie case in front of the judge, even though it is not likely to prevail. (Of course, it must still be brought in good faith, i.e., counsel must believe that it could prevail.) For example, a motion driven by the "educating the judge" goal could be useful if a fairly short track until trial is anticipated and collateral issues, or some "straw man" in the complaint, could unduly sway the court to the plaintiff's point of view, affecting interlocutory decisions or even the trial. Similarly, the 12(b)(6) motion could clarify for the court early on just how high a burden of proof the plaintiff will have to meet to make its case. Here the 12(b)(6) motion is a way of amplifying and framing the defense in a way that the answer, even with properly crafted affirmative defenses, cannot do.

There are risks in this strategy. One is that judges can usually recognize it from afar and may not appreciate what may seem like manipulation. Another is the likelihood that in complex litigation a long discovery and motion schedule, and the attendant involvement of a magistrate, stand between the pleadings stage and trial.

In that case the judge's preliminary opinion on the merits of the respective parties will matter less than a magistrate's view of the proper scope of interrogatories.

(4) Educating the Adversary

When facing a plaintiff whose litigation posture is vulnerable, a forceful motion may be the right tactic. Even a less assailable plaintiff may greet a motion to dismiss, and the attendant effort required to defend against it, with a new sense of realism about the ultimate sustainability of its claim or its desire to proceed as well as about the defendant's resources and abilities.

(5) Partial Dismissal

Finally, the utility of a motion to dismiss under 12(b)(6) should be considered in light of the availability of partial dismissal, i.e., dismissal of only part of a complaint or of some but not all counts of a complaint.

This tool can be very powerful in the defense of commercial cases. Many cases involving multiple counts, often including fraud, conspiracy or RICO claims, merely come down to a basic dispute over a contract. Besides providing spurious bases for federal jurisdiction, illegitimate counts such as those are added because they make available punitive, treble or other enhanced damages as well as attorneys' fees, none of which are normally available in contract actions. Often these "add ons" can be eliminated early, even before discovery, because many such claims have specific pleading requirements that act as gatekeepers at the earliest stage of the litigation. If it is successful with a partial dismissal motion, the defendant can:

o close off potentially dangerous or unreasonably burdensome areas of discovery;

o knock the wind out of a complaint's sails and perhaps cause the plaintiff to question its counsel's judgment; and

o fulfill the "education of the judge" function by undermining the credibility of the plaintiff's claims as well as its way of presenting them to the court.

(d) Conversion into Summary Judgment Motion

If materials extrinsic to the pleadings are submitted to the court in support of or in opposition to a 12(b)(6) motion, the court does not have to consider them. Under FRCP 12(b), however, once the court does consider such matter the motion is automatically "converted" to a motion for summary judgment pursuant to FRCP 56.

Material does not literally have to be bound into the complaint to be considered "intrinsic" to it and a proper part of the consideration of a 12(b)(6) motion, without a "conversion" taking place. Courts have considered, on motions under 12(b)(6), SEC filings and other public records, legislative histories, concurrently or earlier filed pleadings and papers not part of the motion, and any documents incorporated by reference in the pleadings. It can fairly be said that any oral or written evidence not already "in the record" — public or court, physically or by reference — is regarded as "extrinsic" and will spur a conversion.

If the court does convert the 12(b)(6) motion to a summary judgment motion, it opens the door for all pa to submit their own evidence in support of the motion15 Rather than entertain a full blown summary judgment motion at this stage, most judges will simply deny the motion until "the record is developed."

(e) Procedure

Motion practice in general is discussed in Chapter 24 "Motion Practice," infra. Regarding the 12(b)(6) motion in particular, take note of FRCP 12(d) which authorizes, subject to the court's discretion, the motion hearing that is the essence of 12(b)(6) practice.

(f) Conclusion

Much attention is paid to FRCP 12(b)(6) in law school civil procedure classes because it is an excellent device for focusing legal neophytes on the concepts of "cause of action" and "justiciability." Unfortunately this emphasis may leave some lawyers with a disproportionate sense of the importance of the Rule in real life practice. In fact, motions under this Rule are granted sparingly, and invocation of the provision carries a high degree of cost and risk in almost every circumstance. It must be remembered that there is not a home run in every game, and that swinging for the fences is usually a ticket back to the dugout.
